

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

APR -8 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

NICHOLAS JAMES CRETENS,

Appellant.

)
)
) 2 CA-CR 2008-0155
) DEPARTMENT B
)

MEMORANDUM DECISION

) Not for Publication
)

) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200700677

Honorable James L. Conlogue, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Nicholas Cretens was convicted of burglary in the third degree and sentenced to an enhanced, aggravated prison term of twelve years.¹ On appeal, he argues the court erred in denying his motion to change counsel and in imposing an enhanced sentence when the state had failed to file a proper allegation of his prior felony convictions. We affirm his conviction but vacate his sentence and remand his case for resentencing for the reasons that follow.

Change of Counsel

¶2 Cretens committed the present offense on August 7, 2006. Less than two weeks before trial, he filed a motion to change his court-appointed counsel on the grounds that his attorney had not filed necessary pretrial motions, prepared for trial, or adequately communicated with him about the case.² Cretens also expressed dissatisfaction with the twelve-year plea offer he had received and alleged his counsel had divulged to the state confidential information concerning a “possible defense.” The trial court held a hearing on the matter on March 24, 2008, the day before trial began.

¶3 At the hearing, the court indicated it had reviewed the motion and inquired further into the reasons Cretens was seeking different counsel. Cretens maintained that his attorney was not prepared. Cretens also expressed a willingness to enter a plea agreement

¹Cretens was acquitted of theft by knowingly controlling stolen property.

²The “motion” was in fact a letter dated March 13, 2008, that Cretens had sent to the state. The state then distributed the letter to Cretens’s counsel and to the trial court, which received it on March 17. The court deemed the letter a motion for a new attorney and formally filed it in open court on the eve of the trial.

and presented a counteroffer to the state. The court observed that plea negotiations had already taken place, and the prosecutor stated his belief that Cretens's attorney had provided diligent representation during the negotiation process. Cretens's attorney avowed he was prepared for trial and denied the allegations in the motion. The state added that "some of the things [Cretens] has written . . . are flat wrong."

¶4 The court observed Cretens's counsel was "a very high quality counsel[or]" who "ha[d] done many trials in this courtroom." Before ruling on the motion, the court considered the amount of time between the offense and the trial date, the proximity of the motion to the trial, and the potential inconvenience to the witnesses if new counsel were appointed and the trial delayed. In addition, the court found many of Cretens's issues concerned trial tactics and would likely persist regardless of who represented him. The court concluded the hearing by telling Cretens: "You have been in and out of my court since you were a teenager, and I'm aware of the past circumstances and so forth, and so I'm taking a lot of my judicial knowledge of your circumstances into account in denying the motion."

¶5 Cretens argues the trial court abused its discretion in denying his motion to substitute counsel. Specifically, he contends that "[b]ecause the trial court . . . did not conduct any real inquiry into [his] claims, but simply discounted them, the court did not conduct a proper balancing test as required by case law." We disagree.³

³To the extent Cretens also argues he did not receive "effective assistance of counsel," we do not reach this issue on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance claim must be brought in petition for post-conviction relief under Rule 32, Ariz. R. Crim. P.).

¶6 A defendant is entitled to a change in court-appointed counsel only if he establishes an irreconcilable conflict or a total breakdown in communication with his attorney. *State v. Torres*, 208 Ariz. 340, ¶¶ 6, 8, 93 P.3d 1056, 1058-59 (2004); *see also State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998) (noting “[a] defendant is not . . . entitled to counsel of choice, or to a meaningful relationship with his or her attorney”). When a defendant asks for new counsel to be appointed, the court must inquire into the grounds for substitution. *Torres*, 208 Ariz. 340, ¶ 7, 93 P.3d at 1059. The nature of a defendant’s request determines what level of inquiry is required. *Id.* ¶ 8. At minimum, the court must inquire into the basis for the defendant’s request on the record. *Id.* ¶¶ 7-8.

¶7 Personality conflicts and disputes over trial strategy are not irreconcilable conflicts and do not require a formal evidentiary hearing. *See State v. Cromwell*, 211 Ariz. 181, ¶ 30, 119 P.3d 448, 454 (2005). If an alleged conflict is less than irreconcilable, the court need only consider it as one factor among several when determining whether substitution is appropriate. *Id.* ¶ 29. Those factors include “whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and [the] quality of counsel.” *Id.* ¶¶ 29, 31, *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). We review for an abuse of discretion a trial court’s denial of a request to substitute counsel. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶8 Here, the trial court properly inquired into the bases for Cretens’s substitution request. That inquiry revealed Cretens was primarily dissatisfied with the plea offer he had received. Apart from asserting defense counsel did not devote enough time to his case, Cretens raised no other grounds at the hearing for his distrusting or lacking confidence in his attorney. The trial court therefore correctly determined that a more formal evidentiary proceeding was unnecessary. Because the alleged conflict with counsel was less than irreconcilable, the court appropriately considered all the relevant factors when weighing Cretens’s rights against the public interest in judicial economy, *see Cromwell*, 211 Ariz. 181, ¶ 31, 119 P.3d at 454, and it did not abuse its discretion in denying his motion.

Sentence

¶9 Cretens further argues he was sentenced illegally because the state did not “file a proper allegation of [his] prior felony conviction[s] within the time limit set forth by statute and rule.” Specifically, he contends the state did not file properly an allegation of prior convictions under A.R.S. § 13-604 but instead had intended to use his prior convictions only as aggravating factors pursuant to A.R.S. § 13-702.⁴ We review the legality of a sentence enhancement de novo. *See State v. Rasul*, 216 Ariz. 491, ¶ 20, 167 P.3d 1286, 1291 (App. 2007).

⁴Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and consistency with the lower court’s documents, we refer to the version of the code in effect when Cretens committed his present offense, on August 7, 2006. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (former § 13-604); 2005 Ariz. Sess. Laws, ch. 166, § 1 (former § 13-702); 1993 Ariz. Sess. Laws, ch. 255, § 10 (former A.R.S. § 13-701).

¶10 The state charged Cretens with third-degree burglary. The indictment indicated he would be sentenced under A.R.S. §§ 13-701 and 13-702, which provided presumptive terms for first-time offenders and an increased sentencing range for offenses involving aggravating circumstances.⁵ Before trial, the state specifically alleged it was seeking an aggravated sentence on the grounds that Cretens had caused financial harm, pursuant to § 13-702(C)(9), and that he had prior felony convictions, pursuant to § 13-702(C)(11). *See* 2005 Ariz. Sess. Laws, ch. 166, § 1. The state never formally sought to increase the range of Cretens’s potential sentence on the ground that he had historical prior felony convictions qualifying for enhancement under § 13-604. The maximum prison term Cretens could receive with the aggravating circumstances proven as alleged was 3.75 years. *See* 2005 Ariz. Sess. Laws, ch. 166, § 1 (former § 13-702(A)(3)); 2005 Ariz. Sess. Laws, ch. 20, § 2 (former § 13-702.01(A)(3)). If, however, his prior felony convictions could be considered for enhancement purposes under § 13-604, he could receive an aggravated, enhanced sentence of up to fifteen years. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (former § 13-604(C)); 2005 Ariz. Sess. Laws, ch. 20, § 2 (former § 13-702.01(E)(3)); *State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991) (same prior convictions may be used both to aggravate and enhance sentence).

¶11 At trial, the state repeatedly emphasized that it was seeking only an aggravated sentence under § 13-702 and it expressly denied § 13-604 would apply to the case. Nevertheless, both the state’s plea offer and comments made by the prosecutor during trial

⁵The indictment also cited A.R.S. § 13-801, a statute concerning criminal fines.

suggested the state was contemplating a sentence within an enhanced range that would only be available by finding historical prior felony convictions pursuant to § 13-604. When the trial court pointed out this discrepancy and discussed the matter with the prosecutor, the state agreed Cretens should be sentenced “for a class four non-dangerous, non-repetitive felony.” After discussing the matter further, the court scheduled a presentencing hearing and summarized: “[A]gain, just to be very clear. We are not proceeding under [§] 13-604; we are proceeding with the priors with [sic] aggravating circumstances.”

¶12 In its special verdict, the jury found that Cretens had caused financial harm to another person and, at a hearing held prior to sentencing, the trial court found that Cretens had five previous felony convictions for purposes of § 13-702. After noting “these [convictions] were alleged under [§] 13-702(C)(11),” the trial court asked the state what it believed the sentencing range would be. The state then argued Cretens could be sentenced to ten to fifteen years in prison. When the court asked if that meant Cretens could be sentenced under § 13-604, the state now responded affirmatively. The trial court then asked Cretens’s counsel, “You would agree . . . that we are sentencing under [§] 13-604?” to which he replied, “Yes.”

¶13 At the sentencing hearing, Cretens did not object when the court indicated it was sentencing him under § 13-604 for a class four, nondangerous, repetitive felony and imposed an enhanced, twelve-year term. Although he did not challenge the legality of his sentence below, we nevertheless consider the issue on appeal because an illegal sentence

constitutes fundamental error.⁶ *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶14 Section 13-604(P) provides enhanced penalties for repetitive offenders only when “the previous conviction . . . is charged in the indictment or information.” 2005 Ariz. Sess. Laws, ch. 188, § 1. Generally, an indictment authorizes an enhanced sentence under § 13-604 by either citing the statute, *State v. Burge*, 167 Ariz. 25, 27 n.4, 804 P.2d 754, 756 n.4 (1990), or specifically alleging facts justifying enhancement under the statute. *See State v. Tresize*, 127 Ariz. 571, 574, 623 P.2d 1, 4 (1980). In addition, both § 13-604(P) and constitutional guarantees of due process require the state, before trial, to file allegations of prior convictions that will be used for enhancement. *State v. Benak*, 199 Ariz. 333, ¶¶ 13-14, 18 P.3d 127, 130-31 (App. 2001); *State v. Rodgers*, 134 Ariz. 296, 306-07, 655 P.2d 1348, 1358-59 (App. 1982).⁷ In this way, defendants are assured proper notice of the punishments they face should they choose to proceed to trial. *Benak*, 199 Ariz. 333, ¶ 14, 18 P.3d at 131. Defendants are denied adequate notice if they are “misled, surprised or deceived in any way

⁶Insofar as Cretens also argues the state did not timely file its allegations of prior convictions thirty days before trial pursuant to Rule 15.1(d), Ariz. R. Crim. P., the state correctly notes that this rule concerns only disclosure of prior convictions to be used for purposes of impeachment. Section 13-604(P) provides that allegations of prior convictions for sentencing purposes generally must be filed twenty days before trial. 2005 Ariz. Sess. Laws, ch. 188, § 1. The record supports the trial court’s findings that the allegations here were properly filed more than twenty days before trial, notwithstanding the court’s failure to retain a copy of the filing in its record.

⁷The former § 13-604(K), which was considered by the court in *Rodgers*, was later amended and renumbered as § 13-604(P). *See* 1978 Ariz. Sess. Laws, ch. 201, § 101; 1993 Ariz. Sess. Laws, ch. 255, § 7; 2005 Ariz. Sess. Laws, ch. 188, § 1.

by the allegations’ of prior convictions.” *Id.* ¶ 16, *quoting State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985).

¶15 Here, the indictment did not authorize an enhanced sentence. The state did not cite § 13-604 in the indictment, nor did the state move to amend the indictment to seek an enhanced sentence under § 13-604 at any time. *See* Ariz. R. Crim. P. 13.5(a) (allowing state to “amend an indictment . . . to add an allegation of one or more prior convictions” for sentencing purposes); *see also* 2005 Ariz. Sess. Laws, ch. 188, § 1 (prescribing procedure and time limits for alleging prior convictions in § 13-604(P)). Although the state may, after trial has begun, amend a factually flawed enhancement allegation that is otherwise properly made pursuant to § 13-604, *see State v. Cons*, 208 Ariz. 409, ¶¶ 1-2, 6, 94 P.3d 609, 610-11, 612 (App. 2004), the state may not allege, in the first instance, that a provision of § 13-604 applies to a defendant once trial is underway. *See State v. Guytan*, 192 Ariz. 514, ¶ 32, 968 P.2d 587, 595-96 (App. 1998). Because the indictment here never alleged § 13-604 applied to Cretens’s case, and the state never requested an amendment to the indictment—even after it expressly sought an enhanced range at the presentencing hearing—the trial court erred in sentencing him to the enhanced term provided in that statute.

¶16 Moreover, Cretens did not receive constitutionally adequate notice that the state sought to enhance his sentence pursuant to § 13-604. The indictment alleged he would be sentenced under § 13-702, and the state alleged Cretens’s prior convictions would be used as aggravating circumstances pursuant to § 13-702(C)(11). Although the state observes Cretens received notice of the allegations of his prior convictions before trial and argues he

could have inferred from the state's plea offer that it intended to seek an enhanced sentence, such constructive notice is insufficient. A defendant's mere knowledge that the state intends to prove facts that *could* support an enhanced sentence will not make an enhanced sentence legal absent a timely allegation under § 13-604. *See, e.g., Guytan*, 192 Ariz. 514, ¶¶ 32, 35, 37, 968 P.2d at 595-96; *Rodgers*, 134 Ariz. at 306-07, 655 P.2d at 1358-59. Similarly, a defendant's knowledge that the state intends to seek an enhanced sentence does not relieve the state of its obligation to inform the defendant of the statutory grounds for the enhancement. *See, e.g., Benak*, 199 Ariz. 333, ¶¶ 14-18, 18 P.3d at 131-32 (concluding citation to § 13-604 not sufficient notice of violent crime allegation for enhancement purposes). Notice of the statutory basis for an enhanced sentence is especially important when it concerns prior convictions, because the criminal code treats former convictions differently for purposes of aggravation and enhancement. *Compare* 2005 Ariz. Sess. Laws, ch. 166, § 1 (permitting aggravated sentence under § 13-702(C)(11) if defendant "previously convicted of a felony within the ten years immediately preceding the date of the offense"), *with* 2005 Ariz. Sess. Laws, ch. 188, § 1 (permitting enhanced sentence under § 13-604 if defendant has "[h]istorical prior felony conviction[s]," defined, *inter alia*, as "[a]ny class 4, 5 or 6 felony . . . committed within the five years immediately preceding the date of the present offense" or "[a]ny . . . third or more prior felony conviction").

¶17 Here, to the extent the state actually sought to use the prior convictions to enhance Cretens's sentence under § 13-604, its indictment and the allegations made exclusively under § 13-702 were misleading, denying Cretens accurate knowledge of the

term of imprisonment he potentially faced if he chose to reject the state's plea offer and exercise his right to trial. As noted, Cretens faced 1.5 to 3.75 years of imprisonment under §§ 13-702(A)(3) and 13-702.01(A)(3), while he faced between eight and fifteen years under §§ 13-604(C) and 13-702.01(E)(3). *See* 2005 Ariz. Sess. Laws, ch. 188, § 1; 2005 Ariz. Sess. Laws, ch. 20, § 2; 2005 Ariz. Sess. Laws, ch. 166, § 1. Although the state argues the confusion over which statute would apply was “laid to rest” at the presentencing hearing, such belated notice deprived Cretens of his constitutional right to know the range of punishment he faced “*before* trial commence[d].” *State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985).⁸ Because Cretens suffered prejudice not only from the state's deficient notice, but also from the trial court's imposition of a sentence more than eight years greater than that authorized by the unamended charging documents in the case, we must vacate his sentence. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (under § 13-604(P), prior convictions must be alleged with indictment or information); *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985) (when defendant had actual notice from charging document of state's intent to seek enhanced sentence, untimely amendment of allegations to assert different specific conviction not prejudicial).

⁸Even if the state had provided ample constructive notice, in advance of trial, of its intention to seek enhancement pursuant to § 13-604, we are skeptical that a trial court could lawfully impose an enhanced sentence in the absence of any motion to amend the charging documents to include that allegation. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (providing enhanced penalties for repetitive offenders under § 13-604(P) only when previous conviction charged in indictment or information).

Disposition

¶18 We affirm Cretens's conviction. However, because the trial court imposed an illegally enhanced term of imprisonment, we remand the case for resentencing within the range provided by former § 13-702 for a person convicted of a class four felony with two aggravating circumstances.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge